No. 14-613

IN THE

Supreme Court of the United States

MARVIN GREEN,

Petitioner,

v.

PATRICK R. DONAHOE, Postmaster General, United States Postal Service,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Government's brief in opposition is most noteworthy not for what it affirmatively contends but for what it omits and concedes. The Government does not deny that five courts of appeals have held that the filing period for a constructive discharge claim begins when the employee resigns, and that three other courts of appeals, including the Tenth Circuit below, have rejected that view and start the filing period with the employer's last allegedly discriminatory act said to give rise to the resignation. *See* Pet. 11-16.

The Government does not dispute that the question presented is important and that its resolution by this Court would enable administrative agencies and courts nationwide to consistently determine the timeliness of the thousands of constructive discharge claims filed each year. *See* Pet. 16-18.

And perhaps most importantly, having urged the Tenth Circuit to adopt the rule that it thereafter adopted, the Government now does not even attempt to defend the Tenth Circuit's ruling on its merits. *See* Pet. 21-27. What is more, it does not deny that the EEOC has embraced the position taken here by petitioner. BIO 15 n.3; *see* Pet. 19, 27.

Rather than seek to weaken these traditional pillars of certworthiness, the Government says that review of the circuit split would be "premature" because future developments might reconfigure (but not eliminate) it. BIO 9. The Government also contends, based on legal and factual premises rejected by the court of appeals below, that this case is not a suitable vehicle for review. None of these arguments is persuasive, and the petition should be granted.

1. The Circuit Conflict Is Ripe For Review.

a. The Government does not deny that the existing five-to-three circuit conflict spans more than twenty-five years, beginning with the Fourth Circuit's ruling in *Young v. National Center for Health Services Research*, 828 F.2d 235, 238 (4th Cir. 1987), and extending to the decision below, which expressly rejected *Young* and its progeny. Pet. App. 19a-22a.

Nonetheless, the Government contends that review of this pedigreed conflict would be "premature" because the courts of appeals have not dealt with a supposedly pertinent distinction between constructive discharge claims that concern "discrete acts of discrimination," BIO 9, and others that "involve[] allegations of *what would now be called* a hostile work environment," BIO 10 (emphasis added). The Government's suggestion – that the courts of appeals have until recently been ignorant of the hostile work environment doctrine and its potential ramifications for the question presented – is flatly incorrect. This Court held that hostile work environment claims are actionable under Title VII nearly three decades ago, *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), before *any* of the decisions that comprise the circuit split. *See also id.* at 65-66 (noting EEOC guidelines and a consistent body of lower-court case law embracing the hostile work environment doctrine dating from the early 1970's). And that the courts of appeals have been grappling with the question presented since 1987 and have never discovered the distinction suggested by the Government is testament to its implausibility.

The Government's prematurity argument is premised on its speculation that a constructive

discharge claim based on a single discrete act will someday have a different accrual date than one emerging from events that might constitute a hostile work environment. But such a system would be at war with sensible claim administration. In the world conjured by the Government, in every constructive discharge case, the decision maker – the EEOC or an agency official in the first instance – would have to discern whether or not the constructive discharge emerged from a hostile work environment, which "can be determined only by looking at all the circumstances." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993). That type of fact-intensive inquiry would have to be conducted at the threshold of every constructive discharge case, even where the plaintiff had not pled a separate hostile work environment claim.

Moreover, though some constructive discharge claims may have their origins in a single discrete act of the employer, some will involve two or more discrete acts that allegedly led to the employee's resignation. Under the Government's view, in determining the proper filing period, the decision maker would have to ask whether, for instance, a three-act case should be treated like a hostile work environment case or a discrete-act case, or, perhaps, get different treatment altogether.

b. The Government seeks to buttress its claim of prematurity by noting that the decisions of six of the eight courts of appeals that have ruled on the question presented predate this Court's decision in *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101 (2002). But *Morgan* does not help the Government. There, the Court considered when the filing period

begins for both hostile work environment claims and claims that are actionable only after particularized conduct has occurred. *Id.* at 110. Because of the "very nature" of a hostile work environment claim, *id.* at 115, the Court explained, the decision maker must consider a series of acts to determine when the filing period begins. *Id.* at 115-16.

But with respect to particularized claims, including those based on "termination," the Court emphasized that the statutory filing period begins to run at one point only: when the claim first becomes actionable. *Morgan*, 536 U.S. at 114. And a constructive discharge claim becomes actionable when the employee resigns. *Pa. State Police v. Suders*, 542 U.S. 129, 148 (2004); *see* Pet. 3-4. Thus, *Morgan* underscores that the appropriate trigger date for the filing of a hostile work environment claim has no bearing on the trigger date for the filing of a constructive discharge claim. Pet. 23-24 (discussing *Morgan*).

c. The Government claims that post-*Morgan* developments in the courts of appeals prove its point that *Morgan* can be expected to alter the terrain. That is not correct.

In *Alleyne v. American Airlines, Inc.*, 548 F.3d 219 (2d Cir. 2008), for instance (*see* BIO 12-13), the employee was fired and later sued, claiming only a discriminatory loss of seniority, which the employee said could adversely affect her chances for rehire. The employee did not claim constructive discharge, and the Second Circuit did not even cite *Morgan*. The court simply held that because the employee's EEO claim was filed more than 300 days after the alleged loss of seniority, the claim was barred. Thus, contrary to the

Government's assertion, *Alleyne* does not call into question the continuing vitality of *Flaherty v. Metromail Corp.*, 235 F.3d 133 (2d Cir. 2000), which held that the filing period for constructive discharge begins when an employee gives "definite notice of her intention to retire" – a rule that, the court explained, "should be the same in *all cases* of constructive discharge." *Id.* at 138 (emphasis added).

The Government also contends that, in light of *Morgan*, the Seventh Circuit now "sees no conflict" in the courts of appeals. BIO 12. But its lone support is a single sentence in *Cigan v. Chippewa Falls School District*, 388 F.3d 331 (7th Cir. 2004), a case that did not concern limitations periods at all. *Cigan* simply noted that the filing period for a constructive discharge claim runs from the employer's prior acts that "constitute" it, *id.* at 334, which is perfectly consistent with the Seventh Circuit's position on the minority side of the circuit conflict. *See* Pet. 15 (discussing *Davidson v. Indiana-American Water Works*, 953 F.2d 1058, 1059 (7th Cir. 1992)).

The Government does not deny that *Hukkanen v. International Union of Operating Engineers*, 3 F.3d 281 (8th Cir. 1993), squarely held that the filing period for constructive discharge begins with the employee's resignation. Instead, the Government speculates (BIO 13 n.2) that the Eighth Circuit might someday conclude that *Hukkanen* applies only to constructive discharges accompanied by a hostile work environment. But the only case it cites, *Tademe v. Saint Cloud State University*, 328 F.3d 982 (8th Cir. 2003), was a straightforward application of *Morgan* to allegations based on both discrete personnel actions and a hostile work environment. *Id.* at 987-90. *Tademe* sheds no

additional light on how the Eighth Circuit views constructive discharge, which was not at issue or even mentioned in the decision. *Id.* at 984.

Finally, the Government concedes that in *American Airlines, Inc. v. Cardoza-Rodriguez*, 133 F.3d 111 (1st Cir. 1998), the First Circuit measured the limitations period from the date each employee gave notice of resignation. BIO 13. The Government says that *Jorge v. Rumsfeld*, 404 F.3d 556 (1st Cir. 2005), "sees" the Government's *Morgan*-based distinction. BIO 14. But *Jorge* did not discuss *Morgan* and cited *American Airlines* approvingly. *Jorge*, 404 F.3d at 563. It held that neither an employer's lateral transfer nor a non-discriminatory offer of early retirement provided any substantive support for the employee's constructive discharge claim. *Id.* at 562. Thus, it declined to measure timeliness from the date the employee resigned, relying on this Court's decision in *Delaware State College v. Ricks*, 449 U.S. 250, 256-59 (1980), which significantly predates all of the cases comprising the circuit split. *Jorge*, 404 F.3d at 561-64. *See* Pet. 26-27 (discussing *Ricks*). To the extent that this conclusion is in tension with *American Airlines*, it only underscores the pressing need for this Court to provide guidance.

2. This Case Is An Ideal Vehicle For Resolving The Question Presented.

Neither of the two vehicle concerns posited by the Government is a genuine impediment to review.

a. The Government says that petitioner resigned by signing the December 16, 2009 agreement between petitioner and the Postal Service, and thus petitioner's EEO complaint was untimely no matter how the

question presented is resolved. BIO 16. Petitioner's option to resign by the end of March 2010, or, alternatively, to accept a postmaster position in Wyoming, was not an option at all, the Government says, but rather a counterproductive fail-safe aimed at authorizing petitioner to report to Wyoming and continue working for the Postal Service if *petitioner himself* "reneged on his agreement." BIO 16. (The Government also says that the Wyoming option might have become operative for "other reason[s]," BIO 16, but it does not specify what those reasons could have been.)

This view runs headlong into reality. In describing the relevant facts at the outset of its opinion, the Tenth Circuit explained that, under the agreement, petitioner was to be paid for several months "after which he could choose either to retire or to work in a position that paid much less and was about 300 miles away." Pet. App. 2a. The Government acknowledges this statement, but suggests that it was unnecessary to the Tenth Circuit's decision. BIO 17 n.4. That is not correct. The Tenth Circuit's lengthy analysis of the question presented, and its detailed review of the conflicting circuit-court authorities, Pet. App. 15a-23a, was not an elaborate exercise in futility, but rather reflects that its unambiguous understanding of the agreement mattered to the result.

The court of appeals began its legal analysis by noting that "[t]he interesting issue *here* is whether the date of accrual can be postponed from the date of the employer's misconduct until *the employee quits or announces his future departure*" and that "supporting such postponement is that quitting is an element of the [constructive discharge] claim." Pet. App. 18 (emphasis

added); *see also* Pet. App. 16 ("Green argues that the 45-day limitations period did not begin to run *until he announced his resignation.*") (emphasis added). The Tenth Circuit thus understood that if it had sided with petitioner's view of the law, the claim would have been timely, and if it sided with the Postal Service, the claim would be barred.[1]

But that is not all. The *Government itself* repeatedly took the same position below. Although the brief in opposition suggests that these were stray comments, BIO 17 n.4, in fact, they were central to the Government's defense of the constructive discharge claim. On at least seven occasions, the Government's Tenth Circuit brief emphasized that the agreement gave petitioner the option to leave the Postal Service by the end of March or transfer to Wyoming. It explained at the beginning of the brief that the "issue[] presented for review" was whether petitioner's complaint was timely "after he entered into a settlement agreement under which he would either accept a transfer or resign by March 31, 2010." Gov't CA10 Br. 1-2; *see id.* at 5 (same). Along the same lines, the Government maintained that it had not coerced petitioner into resigning through false threats of criminal prosecution because he could have "accepted the transfer to

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[1] Although the court of appeals suggested that some of the conflicting circuit-court authority "perhaps . . . could be distinguished" on the ground that the issue may not have been outcome-determinative in those cases, Pet. App. 20a – a point rebutted in the petition (at 13-14) – it never remotely suggested the same was true in petitioner's case.

Wyoming that he had agreed to in the settlement agreement." *Id.* at 19.[2]

In sum, as the Tenth Circuit recognized, if the timeliness of petitioner's constructive discharge claim had been evaluated under the majority rule in the

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[2] *See also* Gov't CA10 Br. 36 (noting that, under the settlement agreement, "Mr. Green [was] to receive full salary, while relinquishing the Englewood postmaster position and agreeing to either retire or accept transfer to Wyoming"), 44 ("Mr. Green had agreed that by March 31 , 2010, he would either have to retire, or accept a transfer to Wyoming at a reduced salary."), 47 (same), 50 (same). The Government claims support in its Tenth Circuit brief from a statement that, under the agreement, petitioner "agreed to retire." BIO 17 n.4. But what the brief actually says is that petitioner agreed to retire "by March 31, 2010," Gov't CA10 Br. 27, an obvious reference to the option to transfer to Wyoming, particularly in light of the brief's repeated statements that the agreement provided that option.

Despite the Government's contrary suggestion, BIO 17 n.4, the Government's summary-judgment brief in the district court described the settlement agreement just as it later did in the Tenth Circuit. *See* CA10 App. 410 ("[O]nce Plaintiff signed the settlement agreement, Plaintiff still had the option of not retiring and instead transferring to the position in Wamsutter, Wyoming."), 411 (same).

Though the district court's summary-judgment opinion indicated that petitioner retired by signing the agreement, *see* BIO 16, the opinion made no mention of the agreement's text nor even of petitioner's demotion to the Wyoming position. Earlier, however, when it denied the Government's motion to dismiss the constructive discharge claim on inadequate-pleading grounds, the district court described the agreement as "mandat[ing] that by March 31, 2010, Plaintiff must either retire or transfer to a position 400 miles away in Wyoming." CA10 App. 24 (quoting July 12, 2011 order). In any case, the district court's view is irrelevant in light of the Tenth Circuit's ruling that petitioner in fact had the option, until March 31, 2010, to retire or assume the Wyoming position. Pet. App. 2a.

circuits, that claim would have been timely and thus heard on its merits.

b. The Government also maintains that this case is "a poor vehicle" because petitioner's constructive discharge claim "should be barred on the merits by the settlement agreement." BIO 18. That a particular claim might not survive on the merits after remand from this Court generally is not a reason to deny review on a threshold legal issue of national importance. In any case, that argument is particularly weak here.

First, the Government made – and lost – the same argument below. It contended that the agreement was a bar to petitioner's claim that his emergency placement was an adverse employment action. Gov't CA10 Br. 35-38. But the Tenth Circuit allowed petitioner's emergency-placement claim to go forward, noting that "the obvious consequence of the [emergency] placement was to induce Green to settle on terms favorable to the Postal Service." Pet. App. 26a. In light of this holding, it is highly unlikely that the Tenth Circuit on remand would view the agreement as a bar to petitioner's constructive discharge claim.

Second, the Government's argument rests on the inapposite assertion that agreements to settle *Title VII* complaints generally are not subject to attack in light of a preference for voluntary settlement of Title VII litigation. *See* BIO 18-20. But the agreement on which the Government relies here did not arise out of Title VII litigation. As the Tenth Circuit explained, it arose out of an investigation of petitioner in which, as a negotiating tactic, the Postal Service used the threat of criminal charges to coerce petitioner even after the

Postal Service determined that petitioner was not guilty of those charges. *See* Pet. App. 5a.

Nor did the agreement purport to settle *any* claims, present or future, let alone petitioner's later-filed Title VII constructive discharge claim, *see* CA10 App. 610, a point underscored by the Tenth Circuit's resolution of the emergency-placement claim. This fact distinguishes the three cases cited by the Government (BIO 19), which involved either suits simply to enforce Title VII settlements, *Harris v. Brownlee*, 477 F.3d 1043 (8th Cir. 2007); *Saksenasingh v. Secretary of Educ.*, 126 F.3d 347 (D.C. Cir. 1997), or an attack on a settlement agreement that expressly waived all future claims. *Brown v. City of S. Burlington*, 393 F.3d 337 (2d Cir. 2004). If the Government were right that the agreement here could act as an all-purpose litigation bar, defendants could avoid liability on the basis of earlier agreements induced by threats and motivated by racial, retaliatory, or other impermissible animus. That would be anathema to the Nation's antidiscrimination laws.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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